

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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EUGENE CHERRY,

Plaintiff,

v.

MATTHEW FRANK, GERALD BERGE,  
PETER HUIBREGTSE, GARY BOUGHTON,  
BRAD HOMPE, JOAN GERL,  
SGT. C. HANEY, THOMAS BELZ and  
HENRY BRAY,

Defendants.  
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ORDER

03-C-129-C

Plaintiff Eugene Cherry has filed a notice of appeal from the denial of his motion for preliminary injunction following an evidentiary hearing held in this case on July 17, 2003. In addition, he has filed a document titled "Plaintiff's motion to alter or amend judgment pursuant to Rule 59(e) Fed. R. Civ. P.," which I construe as a statement of the issues plaintiff intends to raise on appeal.

Because plaintiff's notice of appeal is not accompanied by the \$105 fee for filing an appeal, I construe the notice to include a request for leave to proceed in forma pauperis on appeal. Plaintiff is a prisoner and his appeal is subject to the 1996 Prison Litigation Reform

Act. This means that I must determine whether his appeal is barred because he has three strikes against him under 28 U.S.C. § 1915(g) or whether it must be certified as not having been taken in good faith. Plaintiff has only one strike. See Hashim a/k/a Tiggs v. Berge, 01-C-314-C (W.D. Wis. Sept. 24, 2001). Therefore, he is not barred from proceeding in forma pauperis under § 1915(g). Moreover, I do not intend to certify that his appeal is not taken in good faith.

The only other requirement before plaintiff may appeal in forma pauperis is that he pay an initial partial payment of the \$105 fee for filing his appeal if he has the means to do so. Plaintiff has submitted a trust fund account statement for the six-month period immediately preceding the filing of his notice of appeal. From the statement, I find that plaintiff has no balance of funds in his prison account and has received no deposits to his account over the last six-month period. Therefore, plaintiff is eligible under 28 U.S.C. § 1915(b)(4) to proceed on appeal without paying an initial partial payment of the filing fee. However, plaintiff still owes the fee and it may be collected from his account pursuant to § 1915(b)(2) when funds exist.

#### ORDER

IT IS ORDERED that plaintiff's request for leave to proceed in forma pauperis on

appeal from the July 17, 2003 order denying his motion for a preliminary injunction is  
GRANTED.

Entered this 1st day of August, 2003.

BY THE COURT:

BARBARA B. CRABB  
District Judge